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No. 85-1503

In the Supreme Court of the United States

OCTOBER TERM, 1985

BRENT C. WATTENBARGER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

CARL H. HORST
Captain, JAGC, U.S. Navy
JEFFREY S. SAWTELLE
Lieutenant Commander, JAGC, U.S. Navy
JOHN B. HOLT
Lieutenant Commander, JAGC, U.S. Navy
PATRICIA J. BATTIN
Lieutenant, JAGC, U.S. Naval Reserve
Appellate Government Counsel
Appellate Government Division
Navy-Marine Corps Appellate Review Activity
Office of the Judge Advocate General of the Navy
Washington Navy Yard
Washington, D.C. 20374

QUESTION PRESENTED

Whether the Court of Military Appeals correctly found that the government's failure to provide petitioner with counsel before trial was harmless beyond a reasonable doubt.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Argument	6
Conclusion	11

TABLE OF AUTHORITIES

Cases:

Ake v. *Oklahoma*, No. 83-5424 (Feb. 26, 1985)	10
Avery v. *Alabama*, 308 U.S. 444	9
Caldwell v. *Mississippi*, No. 83-6607 (June 11, 1985)	10
Caudill v. *Peyton*, 368 F.2d 563	9, 10
Chambers v. *Maroney*, 399 U.S. 42	9
Chapman v. *California*, 386 U.S. 18	7, 10
Coleman v. *Alabama*, 399 U.S. 1	7
Delaware v. *Van Arsdall*, No. 84-1279 (Apr. 7, 1986)	7
Francis v. *Franklin*, No. 83-1590 (Apr. 29, 1985)	7
Geders v. *United States*, 425 U.S. 80	10
Gilbert v. *California*, 388 U.S. 263	7
Hamilton v. *Alabama*, 368 U.S. 52	7, 8
Herring v. *New York*, 422 U.S. 853	10
Holloway v. *Arkansas*, 435 U.S. 475	8, 9
Milton v. *Wainwright*, 407 U.S. 371	7
Moore v. *Illinois*, 434 U.S. 220	7
Rushen v. *Spain*, 464 U.S. 114	7
Timmons v. *Peyton*, 360 F.2d 327	9, 10
United States v. *Blue*, 384 U.S. 251	8
United States v. *Cronic*, 466 U.S. 648	9
United States v. *Doe*, 465 U.S. 605	7
United States v. *Gouveia*, 467 U.S. 180	6, 9
United States v. *Morrison*, 449 U.S. 361	7, 8
United States v. *Wade*, 388 U.S. 218	7
White v. *Maryland*, 373 U.S. 59	7

Constitution and statute:

U.S. Const.:	
Amend. V	8
Due Process Clause	9
Amend. VI	6, 9, 10

Statute – continued: Page

Uniform Code of Military Justice, 10 U.S.C. (& Supp. II) 801 *et seq.*:
Art. 60, 10 U.S.C. (Supp. II) 860 2
Art. 66(c), 10 U.S.C. 866(c) 2
Art. 67(b)(3), 10 U.S.C. 867(b)(3) 2
Art. 128, 10 U.S.C. 928 1-2
Art. 130, 10 U.S.C. 930 1-2
Art. 134, 10 U.S.C. 934 1-2

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OPINIONS BELOW

The opinion of the Court of Military Appeals (Pet. App. 1a-23a) is reported at 21 M.J. 41. The opinion of the Navy-Marine Corps Court of Military Review (Pet. App. 24a-38a) is reported at 15 M.J. 1069.

JURISDICTION

The judgment of the Court of Military Appeals was entered on November 18, 1985. A petition for rehearing was denied on January 10, 1986 (Pet. App. 39a). The petition for a writ of certiorari was filed on March 10, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. (Supp. II) 1259(3).

STATEMENT

Petitioner, a member of the United States Navy, was convicted by a general court-martial of assault with intent to commit rape, assault with means likely to produce grievous bodily harm, and housebreaking, in violation of Articles 134, 128, and 130 of the Uniform Code of

Military Justice (UCMJ), 10 U.S.C. 934, 928, and 930. Petitioner was sentenced to five years' imprisonment, a bad-conduct discharge, a reduction in pay grade, and forfeiture of all pay and allowances. After reviewing the case pursuant to Article 60, UCMJ, 10 U.S.C. (Supp. II) 860, the convening authority approved the conviction and sentence. The Navy-Marine Corps Court of Military Review, on mandatory review of petitioner's conviction and sentence pursuant to Article 66(c), UCMJ, 10 U.S.C. 866(c), affirmed the conviction and sentence (Pet. App. 24a-38a). The Court of Military Appeals granted discretionary review, pursuant to Article 67(b)(3), UCMJ, 10 U.S.C. 867(b)(3), to consider one claim raised by petitioner,[1] and it affirmed the judgment of the Court of Military Review (Pet. App. 1a-23a).

1. The charges stemmed from petitioner's sexual assault on a military dependent. The evidence adduced at trial, the sufficiency of which is not in dispute, is set out in the opinion of the Court of Military Review (Pet. App. 25a-26a). Briefly, it showed that shortly after midnight on December 4, 1980, petitioner entered the victim's home in military housing located near Naval Communications Station Harold E. Holt in Western Australia. Petitioner grabbed the victim around the shoulders and put a knife to her throat. After throwing her to the floor, petitioner choked her, straddled her, and said that he would kill her if she told anyone about his assault. Petitioner tore off her robe, and told her to "get her clothes off" (Tr. 80). As petitioner stood up to turn off a light, the victim ran out the door. Although petitioner chased the victim, she escaped and immediately reported the assault.

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[1] The Court of Military Appeals agreed to review the question whether petitioner was denied the effective assistance of counsel by the delay in providing him with an appointed attorney (Pet. App. 2a).

2. Later that morning, local police officers arrested and confined petitioner. On December 9, 1980, Australian authorities waived their right to exercise jurisdiction over petitioner under the Status of Forces Agreement between Australia and the United States, and they surrendered petitioner to the American military authorities at the Naval Communications Station, where petitioner was held in pretrial confinement until December 22 (Pet. App. 4a, 15a-16a, 26a-27a.

On December 12, the command judge advocate, the only military lawyer stationed at the isolated base, met with petitioner and informed him in writing of his right to counsel (Pet. App. 16a, 27a; Tr. 20). Petitioner acknowledged that he understood his rights, and he waived his right to counsel. On the form provided to him, petitioner wrote, "I desire no cousel [*sic*] at this time. BCW." (Pet. App. 27a; App. Exh. VII, Encl. 9).[2] Despite his waiver, naval authorities in Australia asked the Commanding Officer of the Naval Legal Service Office in Pearl Harbor, Hawaii, to provide a lawyer to represent petitioner during the anticipated investigation into the incident. On December 13, the Pearl Harbor Naval Legal Service Office informed the naval authorities in Australia that Lieutenant Stephen Cochell would serve as petitioner's counsel during the pretrial investigation, which was scheduled to commence in early January 1981 (Pet. App. 16a; App. Exh. VII, Encl. 10). Before Lieutenant Cochell left for Australia, however, the local naval commander on December 19 ordered petitioner to undergo a psychiatric evaluation because of his concern for petitioner's mental condition (Pet. App. 4a, 17a, 27a). The order to evaluate petitioner made Lieutenant Cochell's trip to Australia unnecessary at that time due to delay of the pretrial investigation.

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[2] Subsequently, on December 16 and 17 petitioner withdrew his waiver and asked to speak with a lawyer (Pet. App. 6a n.2, 27a).

On December 21, the sanity board issued its report. The board found that petitioner was mentally incompetent to cooperate with defense counsel and recommended that he receive psychiatric treatment. Because the facility where petitioner was confined could not provide him with the necessary treatment (Tr. 204), petitioner was referred to the Tripler Army Medical Center in Hawaii, where the necessary psychiatric facilities were available. While he was there, petitioner was extensively tested and was placed on medication (Tr. 153-154). On January 13, 1981, a second sanity board found that petitioner was incompetent to stand trial and to assist in his defense, and it recommended further psychiatric treatment for him. Petitioner was therefore transferred on January 25 to the National Naval Medical Center in Bethesda, Maryland, for additional treatment at a psychiatric acute care facility (Tr. 163). Following six weeks of intensive treatment, a third sanity board was convened. That board found petitioner competent to stand trial. He was thereafter confined in the Marine Corps Brig at Quantico, Virginia, until he was transferred to Guam, the site of his trial. Pet. App. 4a, 16a-19a, 27a-28a.

Petitioner first consulted with his attorney on March 26, and he was released from pretrial confinement on the same day. Following two additional sanity examinations, petitioner's trial began on September 21, 1981. Pet. App. 4a, 19a-23a, 28a.

3. At trial, petitioner moved to dismiss the charges. He argued that his right to counsel and his due process rights were violated by the government's failure to honor his request for an attorney from December 19, 1980, to March 26, 1981, the period when he had been found incompetent to consult with counsel and during which he underwent psychiatric evaluation and treatment (App. Exh. II). The trial judge denied petitioner's motion, find-

ing that he had not been prejudiced by the government's failure to provide him with an attorney during that period (Tr. 28; see Pet. App. 11a).

4. The Court of Military Review also rejected petitioner's claim (Pet. App. 30a-33a). The delay in providing petitioner with an attorney was not unreasonable, the court found, because "both practical, logistical considerations and the uncertainty regarding the ultimate determination of [petitioner's] mental state delayed the assignment of counsel" (*id.* at 33a). Although the court noted that the immediate appointment of an attorney for petitioner "probably could have been helpful" for him, the court nonetheless found that petitioner "suffered no substantial risk of prejudice as a result of the delay" (*ibid.*).

5. The Court of Military Appeals affirmed (Pet. App. 1a-23a). At the outset, the court concluded that petitioner's right to counsel under the Sixth Amendment had attached on December 19, 1980, when he had been held in pretrial confinement for more than 48 hours and before he was first ordered to undergo a psychiatric examination, even though the formal charges against him were not preferred until March 12, 1981 (*id.* at 6a). The court also held that, "for purposes of this appeal" (*id.* at 9a) the period from December 19, 1980, to March 26, 1981, was a "critical stage" of the proceedings (*id.* at 9a-10a). Nonetheless, the court found that, for several reasons, the government's failure to provide petitioner with counsel during that period was harmless "beyond any reasonable doubt" (*id.* at 14a; see *id.* at 12a-13a & n.5).

The court found (Pet. App. 12a) that "the prosecution did not exploit the period from December 19, 1980, to March 26, 1981, to develop its case on the merits against [petitioner]," since the government's "overwhelming" proof was based on evidence that was acquired by the Australian authorities before the beginning of that period

and "was not substantially enhanced by any evidence gathered by the prosecution" thereafter (*ibid.*). Petitioner also suffered no disadvantages in preparing his defense, the court held, because all of the evidence acquired by the government was made available to defense counsel (*ibid.*). In addition, petitioner did not forfeit any right during the December-to-March period that could have affected his defense at trial (*ibid.*). Lastly, the court found that petitioner's ability to present an insanity defense was not prejudiced by the delay in receiving an attorney (*id.* at 13a). Petitioner relied on one of the sanity board's reports to present his defense (*ibid.*), and the prosecution did not adduce any of the board's reports to prove that petitioner was sane until petitioner had introduced psychiatric evidence in his own defense at trial (*ibid.*). The court further concluded that petitioner's lack of counsel during the investigation did not hamper him in his efforts to cross-examine the psychiatrist who had conducted the initial sanity board examination (*ibid.*).

ARGUMENT

The fact-bound decision of the Court of Military Appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Accordingly, review by this Court is not warranted.

The decision below that any Sixth Amendment violation that occurred in this case was harmless is consistent with a long line of this Court's decisions.[3] Although reversal of a

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[3] In a criminal case, a defendant's Sixth Amendment right to counsel attaches "only at or after the initiation of adversary judicial proceedings against [him]." *United States* v. *Gouveia*, 467 U.S. 180, 187 (1984). In the military a defendant's right to counsel does not attach until the preferral of charges against him (see Pet. App. 5a). In this case, although the Court of Military Appeals found that the record was unclear as to when charges were first preferred against petitioner, the court concluded that petitioner's right to counsel attached on December 19, 1980, before he was ordered to undergo a psychiatric examination (*ibid*).

defendant's conviction is automatic if he is forced to stand trial without an attorney (*Delaware* v. *Van Arsdall*, No. 84-1279 (Apr. 7, 1986), slip op. 9; *Chapman* v. *California*, 386 U.S. 18, 23 n.8 (1967)), it is also settled that the failure to provide a defendant with an attorney at the pretrial stage of a criminal case can be harmless error (*Rushen* v. *Spain*, 464 U.S. 114, 117-118 n.2 (1983); *Moore* v. *Illinois*, 434 U.S. 220, 232 (1977); *Coleman* v. *Alabama*, 399 U.S. 1, 10-11 (1970); see also *United States* v. *Morrison*, 449 U.S. 361, 365 (1981); *Milton* v. *Wainwright*, 407 U.S. 371 (1972); *Gilbert* v. *California*, 388 U.S. 263, 272, 274 (1967); *United States* v. *Wade*, 388 U.S. 218, 242 (1967); compare *White* v. *Maryland*, 373 U.S. 59, 60 (1963); *Hamilton* v. *Alabama*, 368 U.S. 52, 54-55 (1961)). Petitioner does not challenge the concurrent findings by the three courts below that his failure to receive an attorney during the time that he underwent psychiatric observation and treatment did not prejudice his defense (see Pet. App. 11a-14a, 23a (Everett, J., concurring), 33a; Tr. 28). Those findings, in any event, do not warrant review by this Court (see, *e.g.*, *Francis* v. *Franklin*, No. 83-1590 (Apr. 29, 1985), slip op. 18 n.10; *United States* v. *Doe*, 465 U.S. 605, 613-614 (1984)). Rather, petitioner contends (Pet. 9-13) that the violation that occurred in his case should be conclusively presumed to be prejudicial because of the length of the period during which he lacked counsel. That claim, however, is without merit.

This Court's decisions have held that reversal is required in cases of this type only in limited circumstances: where the government has exploited the accused's lack of counsel to its own benefit at trial,[4] or where the defendant has

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[4] See *White* v *Maryland*, 373 U.S. at 60 (reversal required in a capital case where defendant's unaccepted guilty plea entered at his arraignment in the absence of counsel was later introduced at his trial).

forfeited a right that he could otherwise have exercised.[5] The Court has also suggested that this automatic reversal rule may be limited to capital cases. See *Holloway* v. *Arkansas*, 435 U.S. 475, 489 (1978). None of those factors is present here. Petitioner was not charged with a capital crime, and the delay in providing him with an attorney, as the Court of Military Appeals found (Pet. App. 12a), neither enhanced the government's ability to prove its case nor caused petitioner to forfeit any right.[6] Moreover, petitioner's suggested approach—which hinges on the length of time that a defendant lacks counsel, rather than on the effect that the deprivation had on his trial—would require the courts to engage in an undirected line-drawing exercise in order to decide when the harmless error doctrine suddenly becomes inapplicable and a conclusive presumption of prejudice comes into play. That approach is inconsistent with the Court's precedents and with sound judicial decisionmaking.

Petitioner also contends (Pet. 13-14) that, because of the difficulty of establishing prejudice in a particular case, the failure to provide a defendant with counsel during a pretrial psychiatric evaluation should be conclusively presumed to be prejudicial. However, a conclusive presumption of prejudice cannot be justified on the ground that determining prejudice in a particular case is inherently

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[5] See *Hamilton* v. *Alabama*, 368 U.S. at 54-55 (reversal required in a capital case where defendant forfeited the right to enter an insanity plea at arraignment because he lacked counsel).

[6] Petitioner suggests (Pet. 10) that the absence of counsel could prejudice a defendant's ability to exercise his Fifth Amendment self-incrimination privilege. However, the Court's decisions make clear that the remedy for any such violation is suppression of the defendant's statements, not dismissal of the charges. See *United States* v. *Blue*, 384 U.S. 251, 255 (1966); cf. *United States* v. *Morrison*, 449 U.S. at 364-367. Moreover, in this case the Court of Military Appeals found (Pet. App. 13a n.5) that petitioner did not assert a Fifth Amendment claim below, and he raises no such claim in his petition.

impractical. See *United States* v. *Cronic*, 466 U.S. 648, 661-662 (1984); cf. *Chambers* v. *Maroney*, 399 U.S. 42, 54 (1970); *Avery* v. *Alabama*, 308 U.S. 444 (1940); compare *Holloway* v. *Arkansas*, 435 U.S. at 490-491. In this case, for instance, petitioner was able to suggest a variety of different ways in which he might have been prejudiced by the absence of an attorney. See Pet. App. 8a (listing petitioner's claims of prejudice). That the Court of Military Appeals rejected his claims shows only that they lacked merit, not that the court's inquiry was necessarily futile.

Nor does the decision below conflict with *Timmons* v. *Peyton*, 360 F.2d 327 (4th Cir. 1966) (en banc), or *Caudill* v. *Peyton*, 368 F.2d 563 (4th Cir. 1966), on which petitioner relies (Pet. 14-15 n.14). Neither decision adopted the per se rule that petitioner urges. In *Timmons*, the accused was confined in a psychiatric institution for more than three months after he was arrested, but before he received an attorney; the state refused to disclose the institution's psychiatric reports on the defendant to defense counsel; and the court found that if the defendant had been given a fair opportunity to present his insanity defense, there was "little doubt that a jury would have found that a reasonable doubt existed as to his sanity" (360 F.2d at 332). Therefore, the court held, the cumulative effect of the state's conduct violated the Sixth Amendment and the Due Process Clause by denying the defendant the opportunity to present an insanity defense (360 F.2d at 332). As the Court of Military Appeals correctly recognized (Pet. App. 10a), *Timmons* is clearly distinguishable from this case, because the delay in appointing counsel for petitioner did not in any way interfere with his ability to present his insanity defense.[7]

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[7] Moreover, to the extent that *Timmons* relied on the Sixth Amendment despite the fact that the defendant had not yet been charged with a crime (see 360 F.2d at 330), that ruling has not survived this Court's subsequent decision in *United States* v. *Gouveia*, *supra*.

The *Caudill* case is also inapplicable. Although *Caudill* cited and discussed *Timmons* in dicta (368 F.2d at 564-565), the only question that the court addressed in *Caudill* was whether the defendant received a public trial (*id.* at 565). The *Caudill* decision therefore provides no more assistance to petitioner than does the decision in *Timmons.*[8]

Finally, petitioner maintains (Pet. 15-16) that the Court of Military Appeals misapplied the *Chapman* harmless error standard by imposing on him the burden of proving that the Sixth Amendment violation in his case was prejudicial. In this respect, petitioner has misread the opinion below. The Court of Military Appeals clearly stated that, under *Chapman,* "the burden is on the Government to show that this constitutional error was harmless beyond a reasonable doubt" (Pet. App. 11a). In the passage of its opinion that is quoted by petitioner (Pet. 15-16), the Court of Military Appeals stated only that it was unwilling to presume that the error in this case was inherently prejudicial and thereby deny the government the opportunity to carry its burden under *Chapman.*

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[8] Petitioner's reliance (Pet. 13) on *Geders* v. *United States,* 425 U.S. 80 (1976) (defendant barred from consulting with his attorney during an overnight recess), and *Herring* v. *New York,* 422 U.S. 853 (1975) (defense counsel not allowed to present a summation in a nonjury trial), is also misplaced, since both cases involved restrictions imposed at trial on a defendant or his attorney. *Ake* v. *Oklahoma,* No. 83-5424 (Feb. 26, 1985), also offers petitioner no aid, since petitioner never sought the appointment of a defense psychiatrist at trial. See *Caldwell* v. *Mississippi,* No. 83-6607 (June 11, 1985), slip op. 1-2 n.1.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

CHARLES FRIED
Solicitor General

CARL H. HORST
Captain, JAGC, U.S. Navy

JEFFREY S. SAWTELLE
Lieutenant Commander, JAGC, U.S. Navy

JOHN B. HOLT
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PATRICIA J. BATTIN
Lieutenant, JAGC, U.S. Naval Reserve
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